

JULIE A. DUNNE, Bar No. 160544
jdunne@littler.com
LARA K. STRAUSS, Bar No. 222866
lstrauss@littler.com
MICHAEL G. LEGGIERI, Bar No. 253791
mleggieri@littler.com
LITTLER MENDELSON, P.C.
501 W. Broadway, Suite 900
San Diego, California 92101
Telephone: 619.232.0441
Facsimile: 619.232.4302

TODD K. BOYER, Bar No. 203132
tboyer@littler.com
KARIN M. COGBILL, Bar No. 244606
kcogbill@littler.com
NICOLAS T. KELSEY, Bar No. 246060
nkelsey@littler.com
LITTLER MENDELSON, P.C.
50 W. San Fernando, 15th Floor
San Jose, California 95113
Telephone: 408.998.4150
Facsimile: 408.288.5686

Attorneys for Defendant
APPLE INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMANDA FRLEKIN, DEAN PELLE,
ADAM KILKER and BRANDON
FISHER, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

APPLE Inc., a California Corporation,
Defendant.

Case No. C 13-03451 WHA

**DEFENDANT APPLE INC.'S
OPPOSITION TO MOTION FOR ORDER
GRANTING CONDITIONAL
CERTIFICATION OF FLSA
COLLECTIVE ACTION**

Date: January 16, 2014
Time: 8:00 a.m.
Judge: Hon. William H. Alsup
Dept: 8

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY	2
A.	Procedural History	2
B.	Apple Retail Operations and Plaintiffs' Employment Histories.....	3
C.	Apple's Bag and Personal Apple Technology Check Process.....	4
III.	ARGUMENT.....	5
A.	Because Significant Discovery Has Already Occurred, A Heightened Standard Of Proof Applies To Plaintiffs' Motion.....	5
B.	Facts Regarding Ultimate Liability In This Case Are Not Common.....	7
C.	Plaintiffs' Wholly Unreliable Evidence Cannot Trigger Conditional Certification	9
D.	Substantial Evidence Confirms The Alleged Circumstances Surrounding Bag and Technology Checks Are Not Common	13
1.	Substantial Evidence Confirms Not All Employees Choose To Bring Personal Belongings To Work	13
2.	Substantial Evidence Confirms That Implementation Of Apple's Bag And Technology Checks Is Not Consistent Nationwide	14
3.	Substantial Evidence Confirms That Time Spent Waiting For And Undergoing Bag And Technology Checks Is De Minimis	17
4.	Not All Time Spent In Bag And Technology Checks Constitutes Overtime	18
E.	Plaintiffs' Off-The Clock Overtime Claim Cannot Manageably Be Litigated On A Collective Basis.....	18
1.	The Class Is Not Ascertainable.....	19
2.	Plaintiffs' Claims Are Not Typical	20
3.	There Are Inherent Conflicts Within The Class	20
4.	Common Facts Do Not Predominate Plaintiffs' Overtime Claim	21
5.	Damage Calculations Are Too Individualized For Collective Action.....	23
F.	Any Notice Should Be By First Class Mail And A Third Party Administrator	24

G.	The Request For Appointment Of Lead And Liaison Counsel Is Premature	24
IV.	CONCLUSION	25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adams v. Hy-Vee, Inc.</i> , 2012 U.S. Dist. LEXIS 98590 (W.D. Mo. May 22, 2012)	19
<i>Aguirre v. SBC Communications, Inc.</i> , 2007 U.S. Dist. LEXIS 17259 (S.D. Tex., March 12, 2007)	14
<i>Bennett v. Hayes Robertson Group, Inc.</i> 880 F. Supp. 2d. 1270 (S.D. Fla. 2012)	14, 22
<i>Blakes v. Ill. Bell Tel. Co.</i> , 2011 U.S. Dist. LEXIS 63225 (N.D. Ill. June 15, 2011)	25
<i>Boelk v. AT&T Teleholdings, Inc.</i> , 2013 U.S. Dist. LEXIS 20606 (W.D. Wis. Jan. 10, 2013)	19
<i>Brewer v. General Nutrition Corp.</i> , 2013 U.S. Dist. LEXIS 2948 (N.D. Cal., Jan. 7, 2013)	14
<i>Buckland v. Maxim Healthcare Servs.</i> , 2012 U.S. Dist. LEXIS 122281 (C.D. Cal. 2012)	20
<i>Busk v. Integrity Staffing Solutions, Inc.</i> , 713 F.3d 525 (9th Cir. 2013)	8, 9, 17
<i>Castle v. Wells Fargo Fin., Inc.</i> , 2008 U.S. Dist. LEXIS 106703 (N.D. Cal. 2008)	23
<i>Clausman v. Nortel Networks, Inc.</i> , 2003 U.S. Dist. LEXIS 11501 (S.D. Ind. 2003)	7
<i>Colson v. Avnet, Inc.</i> , 687 F. Supp. 2d 914 (D. Ariz. 2010)	7
<i>Comcast Corp. v. Behrend</i> , ___ U.S. ___, 133 S. Ct. 1426 (2013)	24
<i>Daniels v. Aeropostale West, Inc.</i> , 2013 U.S. Dist. LEXIS 59514 (N.D. Cal. 2013)	25
<i>Delpin Aponte v. U.S.</i> , 83 Fed. Cl. 80 (2008)	20

)

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

1		
2		
3	<i>Eng-Hatcher v. Sprint Nextel Corp.</i> ,	
4	2009 U.S. Dist. LEXIS 127262 (S.D.N.Y., Nov. 13, 2009)	7
5	<i>Espenscheid v. DirectSat USA, LLC</i> ,	
6	705 F.3d 770, 2013 U.S. App. LEXIS 2409 (7th Cir. Feb. 4, 2013)	19
7	<i>Hargrove v. Sykes Enters.</i> ,	
8	1999 U.S. Dist. LEXIS 20141 (D. Or. June 30, 1999)	10
9	<i>Hart v. U.S. Bank NA</i> ,	
10	2013 U.S. Dist. LEXIS 160147 (D. Ariz. Nov. 8, 2013)	25
11	<i>Harvey v. AB Electrolux</i> ,	
12	2012 U.S. Dist. LEXIS 31507 (N.D. Iowa Mar. 9, 2012)	25
13	<i>Hernandez v. Paicius</i> ,	
14	109 Cal App. 4th 452 (2003)	21
15	<i>Hinojos v. Home Depot</i> ,	
16	2006 U.S. Dist. LEXIS 95434 (D. Nev. 2006)	7, 9, 13
17	<i>Hoffmann-La Roche, Inc. v. Sperling</i> ,	
18	493 U.S. 165 (1989)	7
19	<i>Horne v. United Servs. Auto. Ass'n</i> ,	
20	279 F. Supp. 2d 1231 (M.D. Ala. 2003)	8
21	<i>IBP, Inc. v. Alvarez</i> ,	
22	546 U.S. 21 (2005)	9
23	<i>Jones-Turner v. Yellow Enter. Sys., LLC</i> ,	
24	2011 U.S. Dist. LEXIS 118564 (W.D. Key. 2011)	21
25	<i>Martinez v. Cargill Meat Solutions</i> ,	
26	265 F.R.D. 490 (D. Neb. 2009)	25
27	<i>Mateo v. M/S Kiso</i> ,	
28	805 F. Supp. 761 (N.D. Cal. 1992)	21
	<i>Michaelson v. Arrow Transp. Co.</i> ,	
	1997 U.S. Dist. LEXIS 23665 (D. Or. June 6, 1997)	10
	<i>Mike v. Safeco Ins. Co. of Am.</i> ,	
	274 F. Supp. 2d 216 (D. Conn. 2003)	7

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

<i>Pfohl v. Farmers Insurance Group,</i> 2004 U.S. Dist. LEXIS 6447 (C.D. Cal. 2004).....	7
<i>Ruiz v. Serco, Inc.,</i> 2011 U.S. Dist. LEXIS 91215 (W.D. Wis. Aug. 5, 2011).....	19
<i>Santiago v. Amdocs, Inc.,</i> 2013 U.S. Dist. LEXIS 142511 (N.D. Cal. Sept. 30, 2013)	7
<i>Shim v. Echosphere, L.L.C.,</i> 2010 U.S. Dist. LEXIS 135984 (S.D. Fla. Dec. 20, 2010)	22
<i>Shushan v. University of Colorado at Boulder,</i> 132 F.R.D. 263 (D. Colo. 1990)	20
<i>Simmons v. T-mobile USA, Inc.,</i> 2007 U.S. Dist. LEXIS 5002 (S.D. Tex. 2007)	23
<i>Smith v. T-Mobile USA, Inc.,</i> 2007 U.S. Dist. LEXIS 60729 (C.D. Cal. Aug. 15, 2007).....	7
<i>Steiner v. Mitchell,</i> 350 U.S. 247 (1956).....	8
<i>Thompson v. Speedway SuperAmerica LLC,</i> 2009 U.S. Dist. LEXIS 3816 (D. Minn., Jan. 20, 2009).....	7
<i>Till v. Saks & Company,</i> 2013 U.S. Dist. LEXIS 145842 (N.D. Cal. Sept. 30, 2013)	7
<i>Trinh v. JP Morgan Chase & Co.,</i> 2008 U.S. Dist. LEXIS 33016 (S.D. Cal. 2008)	7, 8
<i>Velasquez v. HSBC Fin. Corp.,</i> 266 F.R.D. 424 (N.D. Cal. 2010).....	8
<i>Williams v. Accredited Home Lenders, Inc.,</i> 2006 U.S. Dist. LEXIS 50653 (N.D. Ga., July 25, 2006).....	7
<i>Williams v. Securitas Sec. Servs. USA,</i> 2011 U.S. Dist. LEXIS 92337 (E.D. Pa. 2011)	15, 23, 24

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

STATUTES

29 U.S.C. § 203(g)	8
29 U.S.C. § 207(a)	19
29 U.S.C. § 254(a)	8
29 U.S.C. § 256(b)	25
29 U.S.C.A. § 216(b)	passim

OTHER AUTHORITIES

29 C.F.R. § 778.223	8
Federal Rule of Civil Procedure 23	19, 20, 21
Local Rule 3-12.....	4

Firmwide:124716358.1 999999.7967

1 **I. INTRODUCTION**

2 Through their motion for conditional certification, Plaintiffs ask for permission to send notice
 3 of this action to tens of thousands of current and former Apple hourly employees nationwide. To
 4 justify notice of this magnitude, Plaintiffs must offer proof that their claim for unpaid overtime is
 5 representative of overtime claims that could be asserted by members of the putative class. Plaintiffs’
 6 sparse evidence, standing alone, is insufficient to satisfy even the lenient standard applicable to first-
 7 phase motions for conditional certification. It is certainly insufficient to satisfy the more stringent
 8 standard applicable where, as here, Plaintiffs admit “significant” discovery has already occurred.
 9 More troubling is that the “facts” stated in Plaintiffs’ supporting declarations are not facts at all.
 10 Material portions of Plaintiffs’ declarations came from counsel rather than Apple employees.
 11 Indeed, substantial evidence – including depositions of Plaintiffs and their witnesses, video footage
 12 of actual bag and technology checks, and analysis of Apple time records - confirms that the
 13 supposed facts underlying Plaintiffs’ overtime claim are not uniform at all, but rather personal and
 14 individualized to them (if not entirely untrue).

15 At its core, Plaintiffs’ overtime claim is an off-the-clock claim. Because courts routinely
 16 refuse to certify off-the-clock claims, Plaintiffs urge this Court to certify their claim because it
 17 supposedly turns solely on whether Apple’s bag and personal Apple technology check policy is
 18 lawful. The fallacy of this proposed theory of certification is readily apparent from both Plaintiffs’
 19 complaint and their motion. Plaintiffs nowhere contend that any law arguably prohibits employers
 20 from inspecting their employees’ personal belongings. Instead, Plaintiffs’ overtime claim turns
 21 entirely on the alleged circumstances surrounding the implementation of bag and technology checks.
 22 And Plaintiffs admit that the circumstances surrounding the implementation of checks are **not**
 23 common - not for individual employees day-to-day, much less **all** Apple hourly employees **every**
 24 day. Their overtime claim therefore cannot be litigated on a collective basis.

25 Plaintiffs’ motion for certification is supported by only nine declarations, representing a
 26 startlingly low .0002% of the putative class. The dearth of Plaintiffs’ evidence itself speaks
 27 volumes. What is worse, the nine declarations Plaintiffs submitted are admittedly unreliable.
 28 Witnesses confirmed their declarations were fill-in-the-blank forms provided by counsel, and

witnesses signed the declarations without verifying their accuracy. Indeed, witnesses admitted that material representations contained in the declarations, including time estimates of lengthy bag checks, came from counsel and are false. Courts should not certify claims that have no reliable basis in fact. Separately, Plaintiffs ask for certification based on hearsay internet posts regarding bag checks. Yet, Plaintiffs failed to submit concurrent posts at the very same sites, where Apple employees snubbed Plaintiffs' claim because checks are entirely optional and take mere seconds; posts that prove Plaintiffs' off-the-clock claim is not common across the putative class.

In fact, substantial evidence – including Plaintiffs' own testimony – confirms the alleged circumstances underlying Plaintiffs' overtime claim are not common across all Hourly Employees:

- **The motion** states **all** Apple employees must undergo bag and technology checks. However, **witnesses testified** that only employees who choose to bring personal belongings to work can be subject to checks, and there is no common way to determine which employees choose to bring personal belongings to work on any given day.
- **The motion** states that **all** bag and technology checks are lengthy because employees cannot find managers or because managers are otherwise occupied. However, **witnesses testified** that many times there is no wait at all, and their estimates regarding how often managers are unavailable varied widely from store to store. More than 25 hours of video footage of actual inspections shows managers were immediately available for checks.
- **The motion** states **all** bag checks take a long time because multiple employees leave work together. However, **witnesses testified** that no lines of widely varying lengths; extensive video footage shows that no appreciable lines form on even the busiest days at Apple stores; and analysis of time punch data confirms that the number of employees simultaneously leaving a store varies throughout the day and from store to store.

Because substantial evidence confirms Plaintiffs' off-the-clock overtime claim cannot be resolved on anything but an individual basis, Apple asks this Court to deny Plaintiffs' motion for conditional certification.

II. STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

A. Procedural History

On July 25, 2013, Plaintiffs Frlekin and Pelle filed an action alleging that Apple requires "Hourly Employees to wait in line and undergo two off-the-clock security bag searches and clearance checks when they leave for their meal breaks and after they have clocked out at the end of

1 their shifts.”¹ (Frlekin Complaint, ¶4.) A month later, and after filing Consents to Join the *Frlekin*
 2 matter (Dkt. Nos. 17-19), Plaintiffs Kilker and Fisher filed a separate action containing the identical
 3 allegation. (Kilker Complaint at ¶4.) On September 9, 2013, the Court related the *Frlekin* and
 4 *Kilker* actions pursuant to Local Rule 3-12. (Dkt. No. 40).² On December 13, 2013, Plaintiffs
 5 Frlekin, Pelle, Kilker and Fisher filed a consolidated First Amended Complaint. (Dkt. No. 75).
 6 Plaintiffs seek to conditionally certify a “FLSA Collective Class” comprised of:

7 All Apple Hourly Employees who worked in an Apple retail store in the United
 8 States, who are or were employed within the three years preceding the filing of
 9 [Frlekin Action] (specifically, July 25, 2010) by the Defendant, and who were: (a)
 10 **not compensated for off-the-clock time spent waiting in security screening lines**
 11 **and undergoing personal package and bag searches** before being allowed to leave
 12 the premises; and/or (b) **were not fully compensated for this time worked over**
 13 **forty hours per week** at overtime rates.

14 (Motion at 1:23-28; Proposed Order at ¶1) (emphasis added).

15 B. Apple Retail Operations and Plaintiffs’ Employment Histories

16 Since July 2010, Apple has operated 254 retail stores across 43 states and the District of
 17 Columbia. (Monkowski Decl., ¶3.) Apple currently employs 18,245 Hourly Employees.³
 18 Accounting for average turnover within the Company (Monkowski Decl., ¶9), the putative class is
 19 estimated to be more than 37,000 Hourly Employees.

20 During the alleged three-year class period, Plaintiffs collectively worked at only six Apple
 21 Retail Stores: Century City (in California), West 14th (in New York), CambridgeSide and Natick
 22 Collection (in Massachusetts), Easton Town Center (in Ohio) and Green Hills (in Tennessee).
 23 (Consolidated FAC (Dkt. No. 75), ¶¶ 10, 12, 14, and 16). In the nearly five months since this action
 24 has been pending, only seven other individuals have opted in. (Dkt. Nos. 6, 8, 15, 17, 20, 29, 64).
 25 Collectively, the named Plaintiffs and opt-ins **represent less than 0.0002% of all Apple Hourly**

26 ¹ Plaintiffs confirmed they **are not** pursuing a claim for unpaid minimum wages under the Fair Labor
 27 Standards Act (FLSA). (Strauss Decl., ¶12, Ex. K). The instant motion concerns only whether
 28 Plaintiffs’ FLSA overtime claim should be conditionally certified.

² On October 10, 2013, a third lawsuit was filed by former employee Taylor Kalin, entitled: *Taylor Kalin, et al. v. Apple Inc.*, Case No. C 13-4727-WHA (“*Kalin*”). The *Kalin* action includes substantially identical bag and personal Apple technology check allegations. (Kalin Complaint at ¶¶16-17.) The Court related the *Kalin* action to the *Frlekin* and *Kilker* actions. (Dkt. No. 62). A motion to consolidate all three bag check actions will be heard on January 16, 2014. (Dkt. No. 72.)

³ Apple relies on Plaintiffs’ definition of Apple Hourly Employees. (See Motion at 1:18-21).

1 **Employees** and worked at only 5% of Apple's retail stores nationwide during the alleged limitations
 2 period.⁴ In fact, there are 38 states with Apple retail stores, and the District of Columbia, where
 3 Plaintiffs (including opt-ins) admittedly never worked during the relevant time period.⁵ Plaintiffs
 4 have offered no evidence that they have knowledge of bag or personal Apple technology checks in
 5 any of these locations during the statute of limitations period, much less that Hourly Employees were
 6 required to wait in long lines without pay for those checks.

7 **C. Apple's Bag and Personal Apple Technology Check Process**

8 Apple provides the tools and equipment employees need to perform their jobs. (Monkowski
 9 Decl., ¶10.) Hourly Employees are not required to bring bags or personal technology to work. If
 10 employees choose to bring personal belongings to work, Apple reserves the right to inspect those
 11 employees' bags ("Bag Check") and personal Apple technology ("Technology Check") as
 12 employees leave the store. (To be clear, Apple does not check all personal technology. It checks
 13 only personal Apple technology. (Monkowski Decl., ¶ 12.) Employees who bring non-Apple-
 14 branded technology to work, like a Kindle or a Samsung mobile phone, are not required to undergo
 15 Technology Checks of any kind.) Thus, not all Apple employees are required to go through Bag or
 16 Technology Checks; only employees who choose – for their own personal convenience - to bring
 17 those items to work undergo checks. (Beltzer Depo., 137:9-12).

18 Bag Checks generally consist of a visual inspection of the inside of a bag or a pat-down of
 19 the exterior of a bag. Technology Checks generally consist of a comparison of the serial number on
 20 an employee's technology card with the serial number on their Apple technology. Extensive video
 21 of both Bag and Technology Checks is provided in Exhibits A and B to the Smith Declaration.

22 Apple has no uniform practice for implementing Bag or Technology Checks. (Monkowski
 23 Decl., ¶ 13.) Some stores perform little to no checks because employees store their personal

24 _____
 25 ⁴ Through their declarations, the opt-ins provided testimony as to the existence of bag checks in only
 26 eight additional retail stores. (Shalov Decl., Ex. D, ¶2; Ex. F, ¶2, Ex. M, ¶2, Ex. G, ¶2).

27 ⁵ There is no evidence regarding bag check practices in Alaska, Alabama, Arkansas, Arizona,
 28 Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kansas,
 Kentucky, Louisiana, Maryland, Maine, Michigan, Minnesota, Missouri, Mississippi, North
 Carolina, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania,
 Rhode Island, South Carolina, Texas, Utah, Virginia, Washington and Wisconsin during the statute
 of limitations periods.

1 belongings in off-site break rooms, (Lemin Decl., ¶9-11; O’Leary Decl., ¶10; Melcher Decl., ¶ 8-13;
 2 Policelli Decl., ¶10), or because the employees themselves work in remote stock rooms. (Knopf
 3 Decl., ¶14). Some stores conduct checks on the clock for any number of reasons, including (1) time
 4 clocks are located in off-site break rooms and employees clock out after leaving the store, and thus,
 5 after any check takes place (Melcher Decl. ¶8-13; Lemin Decl., ¶14; Dowling Depo., 109:7-110:3),
 6 or (2) because employees unexpectedly engage in additional work after going through a check and
 7 re-adjust their clock-out time to account the additional work. (Jordan Depo., 88:17-90:8). Other
 8 stores perform Bag and Technology checks only inconsistently. (Knopf Decl., ¶8; Hadfield Decl.,
 9 ¶¶8-12; O’Leary Decl., ¶7; Keenan Decl., ¶7-8; Policelli Decl., ¶¶7-12). Some stores conduct
 10 primarily only Bag Checks, and other stores conduct primarily only Technology Checks. (O’Leary
 11 Decl. ¶12; Brock Decl., ¶7, 10.) And, as Plaintiff Fisher admitted, managers who might normally
 12 conduct a check sometimes allow employees to leave the store without undergoing a Bag or
 13 Technology Check even if they have such items with them. (Fisher Depo., 58:1-22).

14 Moreover, in some stores, managers conduct Bag and Technology Checks on the retail sales
 15 floor. (O’Leary Decl., ¶19). In other stores, managers conduct these checks in their office. (Brock
 16 Decl., ¶ 17). Still other stores have full-time, security personnel who are stationed near the back-of-
 17 house, who are dedicated to performing the checks. (Kamilar Decl., ¶8).

18 As explained more fully below, all of these different Bag and Technology Check practices
 19 affect whether any particular Hourly Employee undergoes a Bag or Technology Check, and if so,
 20 how long it takes to do so, rendering Plaintiffs’ off-the-clock claim unsuitable for collective action.

21 **III. ARGUMENT**

22 **A. Because Significant Discovery Has Already Occurred, A Heightened Standard** 23 **Of Proof Applies To Plaintiffs’ Motion**

24 Plaintiffs urge this Court to evaluate their motion with “leniency” because “discovery is only
 25 beginning.” (Motion at 11:18-12:26). Yet Plaintiffs admit they have already conducted
 26 “substantial” and “significant” investigation of their claims (Motion at 21:13-28), including
 27 interviewing multiple Apple employees about their experiences, securing declarations and
 28 documents from employees, being retained to represent employees in multiple states, drafting and

1 responding to document requests and interrogatories, and arranging for depositions of witnesses in
 2 California, Nevada, Massachusetts, and New York. (*Id.*) Courts routinely require plaintiffs to meet
 3 the much more rigorous second stage standard for conditional certification when significant
 4 discovery has already occurred.⁶ Under this more rigorous standard, plaintiffs must provide
 5 “substantial evidence” that they are similarly-situated to those they seek to represent and that their
 6 claims can be litigated through common facts and evidence.⁷ Moreover, when cases involve
 7 thousands of putative class members, courts carefully scrutinize whether conditional certification
 8 and notice is justified.⁸

9 Even if the Court were to apply the more lenient standard advocated by Plaintiffs,
 10 “conditional certification at the first stage is by no means automatic.”⁹ The collective action
 11 mechanism is appropriate **only if** it permits the “efficient resolution in one proceeding of **common**
 12 **issues of law and fact** arising from the same alleged . . . activity.”¹⁰ In other words, a court must be
 13 satisfied that questions common to a potential group of plaintiffs would predominate a determination
 14 of the merits in this case.”¹¹ Absent such commonality, “it is doubtful that § 216(b) would further
 15

16 ⁶ See *Pfohl v. Farmers Insurance Group*, 2004 U.S. Dist. LEXIS 6447, *9 (C.D. Cal. 2004)
 17 (applying the second stage analysis because discovery had been undertaken); *Till v. Saks &*
 18 *Company*, 2013 U.S. Dist. LEXIS 145842, *31 (N.D. Cal. Sept. 30, 2013) (courts may “commence
 19 the FLSA certification analysis at the second stage to the extent that the parties have had the
 20 opportunity to engage in substantial discovery”); *Smith v. T-Mobile USA, Inc.*, 2007 U.S. Dist.
 21 LEXIS 60729, *4 (C.D. Cal. Aug. 15, 2007) (“Where substantial discovery has been completed,
 22 some Courts have skipped the first-step analysis and proceeded directly to the second step.”);
 23 *Hinojos v. Home Depot*, 2006 U.S. Dist. LEXIS 95434 (D. Nev. 2006) (applying the second step
 24 analysis).

25 ⁷ See *Santiago v. Amdocs, Inc.*, 2013 U.S. Dist. LEXIS 142511 at *13 (N.D. Cal. Sept. 30, 2013) (at
 26 the second stage of the certification process, “it is plaintiffs’ burden to provide substantial evidence
 27 to demonstrate that they are similarly situated”) (quoting *Reed v. County of Orange*, 266 F.R.D. 446,
 28 449 (C.D. Cal. 2010)).

⁸ See *Thompson v. Speedway SuperAmerica LLC*, 2009 U.S. Dist. LEXIS 3816, *10 (D. Minn., Jan.
 20, 2009) (denying conditional certification because the plaintiff failed to make a sufficient
 similarity showing for the putative class); *Eng-Hatcher v. Sprint Nextel Corp.*, 2009 U.S. Dist.
 LEXIS 127262, *16-17 (S.D.N.Y., Nov. 13, 2009) (the size and scope of requested class
 certification impacts the factual showing that a plaintiff must make); *Williams v. Accredited Home*
Lenders, Inc., 2006 U.S. Dist. LEXIS 50653 (N.D. Ga., July 25, 2006) (applying similarity
 requirement with “some rigor” in case involving “as many as 1,000 potential plaintiffs”).

⁹ *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 925 (D. Ariz. 2010); see also *Trinh v. JP Morgan*
Chase & Co., 2008 U.S. Dist. LEXIS 33016, *9-10 (S.D. Cal. 2008); *Clausman v. Nortel Networks,*
Inc., 2003 U.S. Dist. LEXIS 11501, *8 (S.D. Ind. 2003).

¹⁰ *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (emphasis added).

¹¹ *Mike v. Safeco Ins. Co. of Am.*, 274 F. Supp. 2d 216, 220 (D. Conn. 2003).

the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse.”¹² Plaintiffs must therefore show that the proposed class of more than 37,000 Hourly Employees from 254 Apples stores nationwide were all forced to wait in lines for uncompensated bag and personal Apple technology checks, and as a result are entitled to overtime compensation. In the absence of common evidence supporting this theory, the case is not appropriate for judicial intervention, and conditional certification should be denied.¹³ Regardless of which standard the Court applies, Plaintiffs cannot prove that their off-the-clock overtime claim can be litigated on a collective basis.

B. Facts Regarding Ultimate Liability In This Case Are Not Common

Plaintiffs’ overtime claim depends in part on whether time spent in Bag and Technology Checks constitutes “hours worked.” The FLSA broadly defines “hours worked” to include time during which: (a) an employee **is required** to be on duty at a prescribed workplace; and (b) an employee is suffered or permitted to perform work duties.¹⁴ The Portal-to-Portal Act generally excludes time spent “walking, riding or travelling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform,” and “activities which are preliminary and postliminary to said principal activity or activities” from hours worked.¹⁵

To overcome the general exclusion of preliminary and postliminary activities from “hours worked,” a plaintiff must demonstrate that the activity is “integral and indispensable” to the employee’s principal work activities. *Steiner v. Mitchell*, 350 U.S. 247, 332 (1956). An activity is “integral and indispensable” only if: (1) the activity is **required** by the employer, *i.e.*, it is **“necessary to the principal work performed”**; and (2) “done for the benefit of the employer.”¹⁶

¹² See *Horne v. United Servs. Auto. Ass’n*, 279 F. Supp. 2d 1231, 1234 (M.D. Ala. 2003); see also *Trinh*, 2008 U.S. Dist. LEXIS 33016 at *9 (to determine whether plaintiffs are “similarly situated” for FLSA conditional certification purposes, the court should consider “the extent to which members of the proposed action will rely on common evidence”).

¹³ See, e.g., *Velasquez v. HSBC Fin. Corp.*, 266 F.R.D. 424, 431-33 (N.D. Cal. 2010) (denying conditional certification of an off-the-clock overtime claim based on the absence of “single” practice applicable to all putative class members).

¹⁴ See 29 C.F.R. § 778.223; 29 U.S.C. § 203(g).

¹⁵ 29 U.S.C. § 254(a).

¹⁶ *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 530 (9th Cir. 2013) (citing *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-903 (9th Cir. 2003) (emphasis added)).

1 Even if preliminary or postliminary activities constitute “hours worked,” the time spent on those
2 activities must be more than *de minimis* in order to be compensable.¹⁷

3 Plaintiffs contend that under *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525 (9th Cir.
4 2013) (Motion at 2:15-16), time spent in Bag and Technology checks is automatically
5 compensable.¹⁸ But *Busk* is both procedurally and factually distinguishable. Procedurally, *Busk*
6 involved a motion to dismiss where the pleading standards are low and all allegations are assumed
7 true.¹⁹ Here, Plaintiffs seek the right to send notice of this action to tens of thousands of employees,
8 not mere pleading rights, and must demonstrate the allegations underlying their claims are common
9 across the class; allegations of commonality are not assumed to be true.

10 Factually, *Busk* involved a practice where **every** employee was funneled through and subject
11 to a **common** screening procedure.²⁰ Here, (1) Plaintiffs admit that **only employees who choose to**
12 **bring bags or personal Apple technology to work** may be subject to a check (Dowling Depo.,
13 138:6-139:24 (“It is implied that the first step of a bag check is that – is to determine whether or not
14 the person leaving the store has a bag.”));²¹ and (2) ample evidence confirms the procedure for
15 conducting checks varies store to store. (Monkowski, ¶13; O’Leary Decl., ¶7; Keenan Decl., ¶7-8;
16 Hadfield Decl., ¶¶8-12; Kamilar Decl., ¶¶8-12; Knopf Decl., ¶8; Bonnett Decl., ¶¶7-17; Brock Decl.,
17 ¶¶7-11; Melcher Decl., ¶¶5-17; Lemin Decl., ¶¶9-14; Policelli Decl., ¶¶7-12).

18 Moreover in *Busk*, the plaintiffs alleged, and therefore the court assumed, the screenings
19 were job-related.²² Here, Plaintiffs have already admitted that Bag and Technology Checks **are not**

20
21 ¹⁷ *Busk*, 713 F.3d at 532 (screenings lasting five minutes or less are *de minimis* and non-
22 compensable); *see also Hinojos*, 2006 U.S. Dist. LEXIS 95434 at *9 (in FLSA off-the-clock cases,
23 courts should consider whether common evidence predominates questions of both whether the time
24 is compensable “work” and whether it is *de minimis*).

25 ¹⁸ The Supreme Court has rejected the proposition that pre- and post-shift time spent on the
26 employer’s premises is automatically compensable. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 35, 41
27 (2005).

28 ¹⁹ *Busk*, 713 F.3d at 530-31.

²⁰ *Busk*, 713 F.3d at 527 (“Employees waited up to 25 minutes to be searched; removed their wallets,
keys, and belts; and passed through metal detectors”).

²¹ Moreover, Frlekin, Pelle, and Speicher all admit they were not subject to a Technology Check
when they did not own personal Apple technology. (Frlekin Depo., 65:10-17, Pelle Depo., 30:9-15,
Speicher Depo., 108:2-25).

²² *Busk*, 713 F.3d at 531 (“**As alleged**, the security clearances **are necessary** to employees’ primary
work as warehouse employees ... **Assuming, as we must, that these allegations are true**, the
plaintiffs have stated a plausible claim for relief”) (emphasis added).

1 job-related: employees who report to work without bags or personal Apple technology are fully
 2 capable of performing their jobs. (Dowling Depo., 58:24-59:6; Beltzer Depo., 137:9-12; Fisher
 3 Depo., 55:2-8; 56:25-57:3; Speicher Depo., 115:1-9).

4 To date, only two witnesses claim that they were required to bring personal Apple
 5 technology to work. (Dowling Depo., p. 59:8-60:24 (alleging he was required to bring his Apple
 6 computer to work on four days); Beltzer Depo., 54:11-56:4 (“occasionally” he needed to bring his
 7 Apple computer to work, “but it didn’t seem like much of a hindrance at the time”). To the extent
 8 Plaintiffs rely on this theory to certify their off-the-clock claim, their evidence falls far short of
 9 demonstrating Apple had a common policy of requiring all Hourly Employees to bring their personal
 10 Apple Technology to work, and hence, to undergo Technology Checks. In any case, for those
 11 instances where an Hourly Employee claims s/he was required to bring bags or personal Apple
 12 technology to work, a fact finder would need to individually decide whether the Hourly Employee
 13 was actually required to do so. Plaintiffs have offered no uniform evidence regarding the ultimate
 14 question of liability in this case – whether Apple required employees to bring bags or personal Apple
 15 technology to work and thereby required them to undergo a Bag or Technology Checks. Instead,
 16 Plaintiffs’ have alleged only that “common circumstances” supposedly caused all Hourly Employees
 17 to spend more than *de minimis* time in such checks. Plaintiffs’ “evidence” of these alleged
 18 circumstances is wholly unreliable. Plaintiffs, their witnesses and substantial empirical evidence
 19 confirm those circumstances vary store by store, employee by employee, and day by day.

20 **C. Plaintiffs’ Wholly Unreliable Evidence Cannot Trigger Conditional Certification**

21 Courts within the Ninth Circuit require plaintiffs to make an affirmative showing that others
 22 who are allegedly similarly-situated wish to opt into the action.²³ Here, Plaintiffs boast that their
 23 motion is supported by nine declarations. But this case involves more than 37,000 individuals,
 24 meaning Plaintiffs’ offer of proof represents less than .0002% of the putative class. Plaintiffs have

25 _____
 26 ²³ See, e.g., *Hargrove v. Sykes Enters.*, 1999 U.S. Dist. LEXIS 20141, *13-14 (D. Or. June 30, 1999)
 27 (denying conditional certification because there was an “insufficient basis for inferring that other
 28 potential plaintiffs would wish to opt into the proposed class”); *Michaelson v. Arrow Transp. Co.*,
 1997 U.S. Dist. LEXIS 23665 (D. Or. June 6, 1997) (“Before giving notice to potential class
 members in an FLSA action a court should be satisfied that there are potential members who desire
 to ‘opt in’ and who are similarly situated to plaintiff.” *Id.* at *1-2 (emphasis added)).

1 offered no evidence that Hourly Employees in 38 states, as well as the District of Columbia, where
 2 Plaintiffs did not work, were forced to wait in long lines without compensation for Bag and
 3 Technology Checks. Plaintiffs' showing is particularly anemic given that the case has been pending
 4 for more than five months, has received widespread publicity, and Plaintiffs' counsel have
 5 maintained a web site to further advertise this litigation and to solicit opt-ins. (Strauss Decl., ¶13).

6 Even more troubling, the nine declarations submitted by Plaintiffs were "fill-in-the-blank"
 7 forms prepared by counsel, and Plaintiffs and their witnesses admit their declarations are unreliable.
 8 At deposition, witnesses who submitted declarations confirmed that they had no personal knowledge
 9 of some of the material statements made in their declarations and/or the Complaint, and that those
 10 material facts were supplied by their counsel. (*See* Apple's Evidentiary Objections *passim*). For
 11 example, Plaintiff Fisher testified that the estimates of time he spent undergoing Bag and
 12 Technology Checks contained in his declaration, ***were not his own estimates, but were counsel's***:

13 Q. All right. In paragraph 9 it says, "All together, while I worked at the Columbus
 14 Apple Store" - I assume you're referring to Easton Towne Center?

15 A. Yes. Which page are you on?

16 ***

17 Q. "...I spent approximately 16 to 35 minutes per day undergoing 'personal package
 18 and bag searches' and 'personal technology card' checks. And while I worked at the
 19 Nashville Apple Store, I spent approximately 15 to 25 minutes per day undergoing
 20 'personal package and bag searches' and 'personal technology card' checks. Do you
 21 see that?

22 ***

23 A. Oh, okay. I see, I see, I see. Sorry. Yep, I see that.

24 Q. Whose estimate is that of time?

25 A. **That estimate -- estimate is -- was made by my lawyers.**

26 (Fisher Depo., 122:18-123:14.) Over his attorney's objection, Fisher also confirmed the time
 27 estimates in his Complaint came, "from discussions with my lawyers." (Fisher Depo., 113:13-
 28 115:1.) Plaintiff Pelle had no personal knowledge of the very specific allegations in his Complaint
 (*Frlekin* Complaint at ¶12) regarding weeks when his checks were supposedly particularly long:

1 Q. So do you recall waiting ten to 15 minutes at the end of your shift every day
2 during the week of February 19th to February 23rd of this year?

3 A. At this point, I can't say I remember it.

4 Q. Okay. (Reading): "As a further specific example, Mr. Pelle was required to wait in
5 line for off-the-clock security checks before leaving for his meal break at the end of
6 his shift for ten to 15 minutes every day during the week of March 5, 2013 to March 9,
7 2013."

8 Do you remember specifically waiting in line that particular week?

9 A. That was, from what I believe, my last week. Do I remember specifically in my
10 last week going through bag checks? Yes. **Do I know if they were ten to 15 minutes?**
11 **I don't recollect that.**

12 (Pelle Depo., 108:13-109:2) (emphasis added).

13 Incredibly, even after Mr. Pelle disavowed those time estimates at deposition, Plaintiffs
14 subsequently filed a First Amended Complaint containing the same exact allegations. (FAC, ¶12.)

15 Moreover, while Plaintiff Frlekin's declaration states that a check was conducted every time
16 she left the store (Frlekin Decl., ¶6), she admitted at deposition that many times she left the store
17 without any check (Frlekin Depo., 128:10-129:17). While Frlekin's declaration states that security
18 guards performed Bag and Technology checks at her store (Frlekin Decl., ¶6), she admitted at
19 deposition there were no security guards at her store. (Frlekin Depo., 129:18-130:4). While
20 Speicher's declaration states that she "was not compensated for any of this time waiting for,
21 undergoing or performing security checks" (Speicher Decl., ¶9); she admitted at deposition that
22 checks were sometimes performed on the clock. (Speicher Depo., 113:18-114:8, 119:8-20). While
23 Dowling declared that "personal package and bag searches were conducted every time" he left the
24 store (Dowling Decl., ¶6), he later admitted this was not in fact true, since he did not always bring a
25 bag to the store. (Dowling Depo., 138:6-139:24.) Perhaps most incredibly, Plaintiffs' counsel
26 unabashedly admitted that the declarations submitted in support of the instant motion were not
27 accurate, "We'll stipulate [the declaration] is not 100% correct – it happens." (Frlekin Depo., 224:4-
28 225:18; *see also*, Speicher Depo., 135:18-136:14; 152:13-153:4).

Plaintiffs' testimony must be further questioned since many of the declarants have a personal
axe to grind with Apple. Plaintiff Pelle, who was terminated by Apple for misconduct (Pelle Depo.,

Ex. 86), wrote to Plaintiff Frlekin, calling Apple a brainwashing cult and expressing a desire to kick its “a**.” (Pelle Depo., Ex. 87). Plaintiff Kilker, and opt-ins Beltzer, Idakaar and Gregoroff, were all fired for policy violations, including falsifying benefits information. (Kilker Depo., 124:15-127:17; Beltzer Depo., 137:13-139:22; Idakaar Depo., 103:16-107:6; Gregoroff Depo., 221:17-223:24.) Plaintiff Frlekin – angry with coaching she had received during her employment – called her manager a “c***” and later resigned. (Frlekin Depo., 168:7-171:3, Ex. 15; Bonnett Decl., ¶30).

Given the inconsistencies in these witnesses’ declarations and depositions, and given their admitted animosity for Apple, Plaintiffs’ motion raises real credibility concerns. In *Hinojos*, the court denied conditional certification because “the contradictions between plaintiffs’ declarations and their deposition testimony... show the importance of cross-examination of each plaintiff. This suggests the need for separate mini-trials to resolve each individual’s claim. Such a result is the antithesis of collective action treatment and would overwhelm the judicial system and eliminate any judicial efficiency that might be gained through a collective approach.”²⁴

The only other evidence Plaintiffs offered in support of their motion was hearsay, internet posts suggesting Hourly Employees had bag check experiences similar to Plaintiffs’. (See Apple’s Evidentiary Objections No. 21.) Even if the Court considers the posts, Plaintiffs failed to submit several concurrent posts where Hourly Employees reported their experiences were nothing like the Plaintiffs’. On the same Macrumors.com website, and even within the thread from which Plaintiffs pulled the “bedifferent” post, “bearbo” directly contradicts Plaintiffs’ allegations:

You worked for the Apple Retail store, and you had to wait 15 minutes per shift, every single shift, for bag checks after clocking out? **That’s just B.S.**

I worked at two different Apple Retail stores (2006-2008), and at both stores, I only **occasionally** [sic] asked to show the content of my bags, mostly at the end of the day. I don’t remember ever being asked to open by bags during lunch breaks. And **I never had to wait more than 1 minute between clocking out and leaving the store.**

Often times when I worked the last shift, the **managers would even let us clock out after checking our bags.**

(Strauss Decl., ¶14, Ex. M) (emphasis added). A concurrent post from “Grimace” was similar:

²⁴ See *Hinojos*, 2006 U.S. Dist. LEXIS 95434 at *7-8.

5-15 minutes is a complete joke. I was an apple sales person and then manager and **it took all of 15 seconds.** There is always a manager on the floor who is not usually interacting with customers (usually they are managing employees, checking shelf stocks, etc.) so you might wait 30 seconds at the most.

Useless lawsuit, not based in reality. Plus, it is **their choice to bring in personal items** so it will get tossed.

(Strauss Decl., Ex. N) (emphasis added).

Yet another post from “ryntendo” stated that when s/he worked at Apple, “our bag checks were done by security and **took five seconds or less.**” (Strauss Decl., Ex. O) (emphasis added).

In a motion where Plaintiffs are asking the Court for permission to send notice of this action to tens of thousands of Apple employees on the premise that Plaintiffs’ experiences are representative of all Apple Hourly Employees, it is particularly troubling that Plaintiffs have not forthrightly disclosed that several putative class members have already emphatically rejected their claims. Plaintiffs’ “evidence,” on its own, is insufficient to justify conditional certification.

D. Substantial Evidence Confirms The Alleged Circumstances Surrounding Bag and Technology Checks Are Not Common.

Contrary to Plaintiffs’ claim, this Court may still credit Apple’s evidence and consider the entire record developed by the parties even if it applies the “lenient” standard. Courts routinely consider **all** evidence when determining whether a case is properly certified under Section 216(b).²⁵

1. Substantial Evidence Confirms Not All Employees Choose To Bring Personal Belongings To Work

Plaintiffs’ overtime claim hinges initially on whether Hourly Employees choose to bring personal belongings to work, and whether they make that same choice each day. Not even Plaintiffs

²⁵ See *Brewer v. General Nutrition Corp.*, 2013 U.S. Dist. LEXIS 2948, *8-9 (N.D. Cal., Jan. 7, 2013) (“Where the parties have conducted discovery, courts generally will evaluate the evidence put before it when considering whether to conditionally certify a collective action”); *Aguirre v. SBC Communications, Inc.*, 2007 U.S. Dist. LEXIS 17259, *28 (S.D. Tex., March 12, 2007) (“[A]ll the depositions, affidavits and documents are properly considered in deciding whether the first-stage requirements are met. In considering this evidence, the court . . . examines the evidence to determine whether it is appropriate to certify [a class]”); *Bennett v. Hayes Robertson Group, Inc.* 880 F. Supp. 2d. 1270, 1284 (S.D. Fla. 2012) (court considered “the deposition testimony and other record evidence in construing Plaintiffs’ affidavits to better determine whether or not the case is manageable as a collective action”).

1 and the opt-ins made the same choices every day. (Dowling Depo., 58:24-59:6; Beltzer Depo.,
2 137:9-12; Fisher Depo., 55:2-8; 56:25-57:3).

3 Plaintiffs' overtime claim further hinges on whether Hourly Employees: (1) choose to leave
4 the store for breaks; and (2) choose to take their bags and/or personal Apple technology with them
5 when they leave the store for breaks. Plaintiffs admit Apple does not require Hourly Employees to
6 do either. (Pelle Depo., 48:18-49:1; Frlekin Depo., 82:11-83:7; Beltzer Depo., 147:13-25; Idakaar
7 Depo., 113:21-114:4; Dowling Depo., 138:6-139:24). In fact, Plaintiffs and their witnesses all
8 admitted that they and other Hourly Employees did not always leave the store for meals and/or did
9 not always take personal belongings with them when they did so. Fisher testified:

10 **Q.** So if you brought a bag, what percentage of the time would you take it out for
11 lunch? We're just talking about Easton right now.

12 **A.** 20 percent of the time maybe. Not a lot. Not a lot.

13 **Q.** When you were at Green Hills, how often would you bring a bag? Was it any
14 different?

15 **A.** Yeah. Their cafeteria was inside, and so I rarely took my bag out there.

16 (Fisher Depo., 56:16-24.)

17 Plaintiffs' own testimony confirms that Hourly Employees make different personal choices
18 every day that determine whether Bag and Technology Checks occur. Courts refuse to certify claims
19 when liability turns, particularly in such large part, on personal choices.²⁶

20 **2. Substantial Evidence Confirms That Implementation Of Apple's Bag** 21 **And Technology Checks Is Not Consistent Nationwide**

22 Plaintiffs' overtime claim also hinges on their allegation that, due to various circumstances,
23 **all** Bag and Technology Checks take more than a *de minimis* amount of time. This allegation is
24 perhaps most easily rebutted by Plaintiffs' own demonstrations of Bag and Technology Checks,
25

26 ²⁶ See *Williams v. Securitas Sec. Servs. USA*, 2011 U.S. Dist. LEXIS 92337 (E.D. Pa. 2011) (denying
27 conditional certification because "[b]ased on the facts before the court, the frequency with which
28 uniforms are cleaned and ironed is entrusted to the individual employee's discretion and, as a result,
varies from employee to employee. Thus, the court simply cannot infer that Securitas employees
have similar claims for uncompensated time spent maintaining Securitas uniforms.").

1 which with obvious efforts to move slowly, lasted from 16 to 33 seconds,²⁷ and Apple's extensive
 2 surveillance video of checks, which show hundreds of actual checks that were much shorter. (Smith
 3 Decl., Exs. A and B.) In any event, Plaintiffs admit that the circumstances allegedly causing
 4 prolonged Bag and Technology Checks vary store to store and day to day.

5 First, Plaintiffs claim that all Bag and Technology Checks take a long time because “. . .
 6 Apple employees . . . ***must find a supervisor to conduct the check.***” (Motion at 2:17-20.) As a
 7 preliminary matter, this allegation has no application to stores, such as 5th Avenue, where
 8 designated security guards stationed at specific locations perform Bag and Technology Checks.
 9 (Kamilar Decl., ¶ 8-9; Smith Decl., Ex. A, B.) Even at stores where managers perform Bag and/or
 10 Technology Checks on the sales floor generally, managers are usually readily available:

- 11 • Jordan testified he never had to wait for a check. (Jordan Depo., 7:10-21).
- 12 • Dowling testified that 40% of the time they left a store, they did not have to wait for a
 13 check. (Dowling Depo. 84:7-12).
- 14 • Frlekin testified that 10% of the time she left a store, she did not have to wait for a
 15 check. (Frlekin Depo., 71:5-14).

16 Moreover, an Hourly Employees' ability to locate a manager would obviously depend on
 17 how many managers are working in the store at the time. Manager staffing levels vary from store to
 18 store. Currently, manager staffing levels in Apple stores across the country vary from 5 to 40
 19 managers. (Monkowski Decl., ¶ 8.) Thus, testimony of Hourly Employees and substantial empirical
 20 evidence confirms the alleged delay caused by needing to find a manager is not common.

21 Second, Plaintiffs claim that Bag and Technology Checks take a long time because,
 22 “***oftentimes²⁸ [managers are] engaged in other job related duties.***” (Motion 8:3-7) (emphasis
 23 added). Again, witnesses thus far report manager delays from 0% to 90% of the time (see testimony

24 ²⁷ See Boyer Decl., Ex. A (Beltzer Depo., Video at 16:15:46-16:16:13 (Bag Check lasted 27
 25 seconds); Beltzer Depo., Video at 13:12:10-13:12:43 (Technology Check lasted 33 seconds);
 26 Dowling Depo. Video at 12:08:19-12:08:36 (Bag Check lasted 17 seconds); Dowling Depo. Video at
 27 12:09:18-12:09:50 (combined Bag and Technology Check lasted 32 seconds); Frlekin Depo. Video
 28 at 12:24:15-12:24:31 (Bag Check lasted 16 seconds), Frlekin Depo. Video at 5:03:40-5:03:59
 (Technology Check lasted 19 seconds); Pelle Depo Video at 16:27:14-16:27:33 (Bag Check lasted
 19 seconds)).

²⁸ The mere fact that Plaintiffs argue this situation arises “oftentimes” confirms it does not arise
 uniformly or commonly for all Hourly Employees.

1 above) and extensive video footage of actual Bag and Technology Checks show checks occurring
 2 with no delay. (Smith Decl., Ex. B.) Plus, whether to wait for one manager to conduct a check, or
 3 go to another available manager, is an employee's "prerogative." (Speicher Depo., 67:6-16.)

4 Third, Plaintiffs' claim "[o]ftentimes, Specialists and Managers *leave for lunch or end their*
 5 *shift at the same time, which creates lengthy lines and backups for managers...*" (Motion 8:3-7)
 6 (emphasis added). This is yet another theory of liability where the alleged circumstance is not
 7 common. Plaintiffs' own testimony confirms the alleged formation of lines varies store to store:

- 8 • Frlekin claims the longest lines she experienced at the Century City store was 5 to 10
 9 people. (Frlekin Depo., 79:21-80:1).
- 10 • Beltzer claims the longest line he experienced 5th Avenue was 30 people. (Beltzer
 11 Depo., 65:22-25).
- 12 • Beltzer then testified that in three other stores where he worked, the longest line for a
 13 Bag or Technology check was only two to three people. (Beltzer Depo., 176:17-
 177:12).

14 Obviously, the formation of lines at any store depends on staffing levels for the store, and
 15 staffing levels are not common nationwide. Some Apple stores have as few as 47 employees and
 16 other stores have more than 779 employees. (Monkowski Decl., ¶ 7). Analysis of Apple's time-
 17 punch data confirms that the number of employees who punch out of work within close temporal
 18 proximity of one another varies from store to store, and even throughout the workday at any
 19 particular store. (Hall Decl., Ex. B at p. 1.) Indeed, Plaintiffs' "line theory" itself demonstrates why
 20 their overtime claim cannot be tried on a representative basis. In a line of 10 people, the first person
 21 in the line has no wait. The amount of time person two spends waiting for a check is entirely
 22 dependent on how long it takes person one to complete a check, which in turns depends on how
 23 many items person one brought to work. Once person two's check begins, the amount of time
 24 person three must wait depends entirely on the individualized circumstances surrounding the checks
 25 for persons one and two, and so on. Inevitably, the amount of time person ten spends waiting is
 26 longer than any of the people ahead of him/her, but whether the time person 10 waited is more than
 27 *de minimis* (i.e., more than five minutes under *Busk*), depends on how long each individual check
 28 took for the preceding nine employees. There is no way a trier of fact could determine, on any

particular workday, whether an Hourly Employee was in a line, where in the line the Hourly Employee was, and whether the time s/he waited in line was more than *de minimis*.

3. Substantial Evidence Confirms That Time Spent Waiting For And Undergoing Bag And Technology Checks Is *De Minimis*

In an apparent attempt to avoid Apple's *de minimis* defense, Plaintiffs allege "... employees wait 10 minutes or more several times a day for [bag and technology] checks ..." (Motion at 2:17-20.) Obviously, the testimony of Plaintiffs and witnesses outlined above confirms that not all Bag and Technology Checks take the same amount of time, and not all checks take ten or more minutes, confirming that checks are *de minimis*. For a broader evaluation of data, Apple retained Dr. Randy Hall, Vice President of Research and a Professor in the Daniel J. Epstein Department of Industrial and Systems Engineering at the University of Southern California, to (1) analyze Apple time punch data from stores where Plaintiffs and opt-ins previously worked, and (2) review surveillance footage from those stores to determine whether Plaintiffs' allegations regarding the time it takes to conduct Bag and Technology Checks is common.²⁹

Dr. Hall observed that the time to complete an inspection (*i.e.*, wait for and undergo a check) at the roughly 800-employee Fifth Avenue store (Kamilar Decl., ¶ 5), during peak times ranged from zero to 122 seconds, and averaged only 20 to 21 seconds per employee in the sampled video. (Hall Decl., Ex. B at p. 1.). Notably, time spent **performing the check** did not increase during peak hours (*Id.*), and the average **waiting time** at the 5th Avenue store during the busiest punch-out period on November 29, 2013, ("Black Friday") was 9.5 seconds per employee, compared 3.5 seconds during a more typical period (August 31, 2013, from 7:45-8:15 a.m.). (*Id.*) Dr. Hall observed waiting times ranged from zero to 49 seconds. (*Id.*) Dr. Hall opined that a "very high-end estimate" for the average amount of Bag and Technology check time (including **both inspection and waiting time**) for Apple employees is a mere **30 seconds**. (*Id.* at p. 22.) Critically, this high-end estimate is based

²⁹ Dr. Hall reviewed video footage of Bag and Technology Checks for specific days at three Apple stores where one or more Plaintiffs or opt-ins worked: the 5th Avenue store in New York City; The Mall at Green Hills in Nashville, Tennessee; and The Mall at Wellington Green in Wellington, Florida. He also analyzed employee time-punch data for the same stores and days. The video times were selected due to the numbers of individuals clocking out in a given period. (Hall Decl., Ex. B. at p. 8.) Black Friday was selected at 5th Avenue due to the number of employees scheduled to work. (*Id.*)

on data applicable to the relatively large 5th Avenue store and is based in large part on data from an atypically high-traffic Black Friday.

By comparison, Bag and Technology Checks at Apple's 105-employee Green Hills store (Brock Decl., ¶ 5), lasted no more than five seconds on the subset of occasions where such checks did occur. (Hall Decl., Ex. B at p. 1, 20.) No lines of employees waiting for inspections were observed at all at Green Hills. (*Id.*)³⁰

4. Not All Time Spent In Bag And Technology Checks Constitutes Overtime

To substantiate their claim for overtime wages, it is not enough to merely allege Hourly Employees worked off-the-clock. Plaintiffs must further demonstrate that the alleged off-the-clock time constitutes overtime. Plaintiffs have not (and as explained below cannot) demonstrate that all of the time Hourly Employees spend in Bag and Technology Checks constitutes overtime.

Under the FLSA, only time worked in excess of 40 hours in a workweek constitutes overtime.³¹ Of Apple's current 18,245 Hourly Employees, a full 11,237 are part-time employees with a regular schedule of less than 28 hours/week. (Monkowski Decl., ¶6.) Even if Plaintiffs' longest time estimates for Bag and Technology checks were true, time spent in those checks still would not put all Hourly Employee over 40 hours in a workweek. Thus, for a significant portion of the putative class, Plaintiffs have not even alleged sufficient facts to support an overtime claim.

E. Plaintiffs' Off-The Clock Overtime Claim Cannot Manageably Be Litigated On A Collective Basis.

Many Courts of Appeals reviewing conditional certification of FLSA actions have acknowledged the similarities between the conditional standard under the FLSA and the standard under Federal Rule of Civil Procedure 23.³² Apple requests that the Court apply Rule 23 standards

³⁰ Video at the Wellington Green store showed only four Bag and Technology Checks; a sample too small for analysis.

³¹ 29 U.S.C. § 207(a).

³² See *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 2013 U.S. App. LEXIS 2409 *2 (7th Cir. Feb. 4, 2013) ("there isn't a good reason to have different standards for the certification of the two different types of action [under Rule 23 and the FLSA], and the case law has largely merged the standards[.]"); *Adams v. Hy-Vee, Inc.*, 2012 U.S. Dist. LEXIS 98590, at *13-14 (W.D. Mo. May 22, 2012) (applying *Dukes* in denying broad conditional certification; noting that *Dukes* "is illuminating" in the Section 216(b) context); *Ruiz v. Serco, Inc.*, 2011 U.S. Dist. LEXIS 91215 *18-19 (W.D. Wis. Aug. 5, 2011) (same); *Boelk v. AT&T Teleholdings, Inc.*, 2013 U.S. Dist. LEXIS 20606 *38-41 (W.D. Wis. Jan. 10, 2013) (declining to conditionally certify a collective action based

here to the greatest extent possible. Although litigants often argue otherwise, the court in *Shushan v. University of Colorado at Boulder*, 132 F.R.D. 263 (D. Colo. 1990), demonstrated how FLSA collective actions and Rule 23 class actions are not mutually exclusive. The *Shushan* court found that representative actions under § 216(b) “must satisfy all of the requirements of Rule 23, insofar as those requirements are consistent with 29 U.S.C.A. § 216(b).”³³

Moreover, in 2002, the Court of Federal Claims adopted procedural rules that closely follow the Federal Rules of Civil Procedure. See Rules of the U.S. Court of Federal Claims (RCFC) 1, 2002 Rules Committee Note. The primary difference between RCFC 23 and Rule 23 is that class members must opt into class actions under the RCFC. RCFC 23’s procedures have been applied to several opt-in class actions, including *Delpin Aponte v. U.S.*, 83 Fed. Cl. 80 (2008), which arose under the FLSA. Thus, Rule 23, with slight changes, can apply to opt-in actions.

1. The Class Is Not Ascertainable

Plaintiffs fail to explain how the parties can identify which Hourly Employees belong in their proposed class. As the facts above establish, clearly not all Hourly Employees belong in the class. Identification of which Hourly Employees may have a claim for overtime wages based on time allegedly spent in Bag and Technology Checks requires numerous individualized inquiries, including: (1) did an Hourly Employee choose to bring a bag or personal Apple technology to work, and on what days; (2) did an Hourly Employee store his/her bags or personal Apple Technology in the store versus an off-site break room; (3) did an Hourly Employee work in, or clock out from, the store versus an off-site location; (4) for the days the Hourly Employee did choose to bring a bag or personal Apple technology into a store, did the Hourly Employee undergo a Check; (5) did an Hourly Employee spend any more than a *de minimis* amount of time in Bag or Technology Checks; and (6) did the amount of time spent in Bag or Technology Checks during any particular workweek put the Hourly Employee in an overtime position. Courts routinely decline to certify claims when

in part on concerns of commonality recognized by the Court in *Dukes*); *Buckland v. Maxim Healthcare Servs.*, 2012 U.S. Dist. LEXIS 122281, *11-12 (C.D. Cal. 2012) (analyzing the “similarly situated” requirement under the FLSA in relation to Rule 23’s commonality requirement in light of *Dukes*.)

³³ *Shushan*, 132 F.R.D. at 265.

1 the alleged class is grossly overbroad and there is no manageable way to ascertain who belongs in
2 the class.³⁴

3 **2. Plaintiffs' Claims Are Not Typical**

4 To proceed on a collective basis, Plaintiffs' individual claims should be typical of those they
5 seek to represent. Otherwise, Apple would be deprived of its due process rights to cross-examine
6 non-testifying opt-ins. Plaintiffs here should not be permitted to play both sides of the fence. They
7 have not, and cannot, prove that their experiences are representative due to the inherently person-
8 specific nature of off-the-clock work cases. Yet, they want to act like Rule 23 class representatives
9 and try this case on the basis of their experiences. Permitting that "out" would deprive Apple of its
10 rights to defend against individual claims and cross-examine each opt-in. Although Plaintiffs claim
11 that a common question is raised by the claims of the putative class, that question does not have a
12 common answer. As the Supreme Court noted in *Dukes*, "[w]hat matters to class certification . . . is
13 not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide
14 proceeding to generate common answers apt to drive the resolution of the litigation."³⁵

15 **3. There Are Inherent Conflicts Within The Class**

16 Citing no authority, Plaintiffs ask this Court to ignore inherent conflicts within their own
17 class. However, courts deny certification when such conflicts exist, particularly when the conflicts
18 require class counsel to "skewer" their own proposed clients.³⁶ The following excerpt from the
19 deposition of Peter Jordan, the first putative (non-opt-in) class member to be deposed by Plaintiffs'
20 counsel, demonstrates that proposed class counsel will be required to do just that:

21
22
23 ³⁴ In this context, the ascertainability requirements of Rule 23 are instructive. *See Jones-Turner v.*
24 *Yellow Enter. Sys., LLC*, 2011 U.S. Dist. LEXIS 118564 (W.D. Key. 2011) (denying certification
25 where the only way to ascertain who belongs in the putative class is to reach a determination on the
26 merits of each individual employee); *Mateo v. M/S Kiso*, 805 F. Supp. 761, 773 (N.D. Cal. 1992)
(holding that the class definition was "so broad as to be unascertainable, and on that basis alone, un-
certifiable").

³⁵ 180 L. Ed. 2d at 390 (internal citations omitted).

³⁶ "The spectacle of an attorney skewering her own client on the witness stand in the interest of
27 defending another client demeans the integrity of the legal profession and undermines confidence in
28 the attorney client relationship." *Hernandez v. Paicius*, 109 Cal App. 4th 452, 467 (2003), *overruled*
in part on other grounds in People v. Freeman, 47 Cal. 4th 993 (2010).

1 **Q. So you're saying that you, including waiting in line, getting your bag checked,**
 2 **getting your technology card checked, has [sic] never taken more than 30 seconds**
 3 **in your experience?**

4 A. My day-to-day experience is I do not wait in line, and that process takes 30
 5 seconds, if that. Sometimes as little as five seconds.

6 **Q. Have you ever actually timed it, or are you estimating?**

7 A. Yesterday, actually, because I knew I was coming here, I timed it.

8 (Jordan Depo., 7:10-21.)

9 As this passage confirms, to prosecute Plaintiffs' overtime claims on behalf of some Hourly
 10 Employees, Plaintiffs' counsel will be forced to cross-examine and discredit other Hourly
 11 Employees. That situation alone renders Plaintiffs' claims unsuitable for collective litigation.

12 **4. Common Facts Do Not Predominate Plaintiffs' Overtime Claim.**

13 To grant Plaintiffs' motion, this Court must be satisfied that the case is "manageable as a
 14 collective action."³⁷ Given the numerous factual discrepancies impacting the liability decision in
 15 this case, Plaintiffs at a minimum are required to offer an explanation as to how their case can be
 16 tried on a representative basis. They have offered none. Apple's expert, Dr. Hall, has concluded
 17 that Plaintiffs' overtime claim cannot be litigated on a representative basis.

18 Dr. Hall analyzed time-punch data and observed extensive surveillance video of checks at
 19 three of the stores where Plaintiffs and/or opt-ins had worked. Dr. Hall noted that the Bag and
 20 Technology Check procedures at each of the stores were different: at 5th Avenue, a posted security
 21 guard performed the checks; at Green Hills, a manager in the office performed the checks; and at
 22 Wellington Green, managers on the floor performed the checks.

23 Dr. Hall concluded that inspection times depend in large part on individualized factors. For
 24 example, inspections at the 5th Avenue store were highly variable from employee to employee due
 25 to: how long the employee conversed with the guard or others; whether the employee was prepared

26 ³⁷ *Bennett*, 880 F. Supp. 2d at 1284-85 (denying motion to conditionally certify tip credit class under
 27 the FLSA where "several individualized issues . . . render[ed] the group unmanageable as a
 28 collective class"); *Shim v. Echosphere, L.L.C.*, 2010 U.S. Dist. LEXIS 135984, at *5-6 (S.D. Fla.
 Dec. 20, 2010) (denying conditional certification to a putative class of cable technicians given
 "significant individual considerations" which would "likely multiply if the Court conditionally
 certified a nationwide class" and would "not promote judicial and litigant economy, which are, of
 course, the *raison d'être* of the § 216(b) collective action").

1 for inspection upon arrival, and the number and types of items carried. (Hall Decl., Ex. B at p. 1.)
 2 The testimony of Plaintiffs' witnesses confirms Dr. Hall's findings. Beltzer testified that a
 3 Technology Check would be as few as 30 seconds if he had the screen on his iPhone set to the serial
 4 number and his technology card out. (Beltzer Depo., 77:19-78:17). He further testified that the time
 5 it took for a Technology Check was directly tied to the number of personal Apple products he chose
 6 to bring to work on any given day. (Beltzer Depo., 79:22-80:4). Dowling was able to altogether
 7 avoid a Technology Check for his computer by placing a sticker with his name on the computer.
 8 (Dowling Depo., 73:6-23). Idakaar testified her checks at lunch could be shorter if she chose not to
 9 bring all of her personal belongings with her. (Idakaar Depo., 61:11-22). Opt-in Speicher confirmed
 10 the amount of time for a bag check varies depending on the type of bag. (Speicher Depo., 60:3-12).

11 In his report, Dr. Hall provided actual ranges of time and average times to complete checks,
 12 together with actual ranges of time as well as the average time spent waiting for checks. However,
 13 Dr. Hall further confirmed that a fact finder could not extrapolate the average observed time in Bag
 14 and Technology Checks to all Hourly Employees because the differences in time spent in such
 15 checks was in large part due to Hourly Employees' personal choices and conduct. In statistical
 16 terms, Dr. Hall explained: "The fact that the standard deviation for inspection and waiting times is
 17 near or in excess of the value of the average inspection and waiting time suggests both substantial
 18 variability and very low predictability on an individual level. Further, the greater part of the
 19 variability I observed resulted from choices made by employees themselves (e.g., the decision to
 20 stop and talk to a guard or to come to the bag/technology check process unprepared)."

21 Based on all of these factors, Dr. Hall concluded that one could not come to any valid or
 22 reliable conclusions regarding the average amount of employer-required time experienced by Hourly
 23 Employees in all stores across the United States. Courts routinely deny certification of off-the-clock
 24 wage claims precisely because the question of liability depends so fundamentally on individualized
 25 questions of fact.³⁸ In *Williams v. Securitas Sec. Servs. USA*, 2011 U.S. Dist. LEXIS 92337, the

26
 27 ³⁸ *Castle v. Wells Fargo Fin., Inc.*, 2008 U.S. Dist. LEXIS 106703 (N.D. Cal. 2008) ("The variety of
 28 different circumstances under which the declarants were allegedly required to work unpaid overtime
 also weights against certification"); *Simmons v. T-mobile USA, Inc.*, 2007 U.S. Dist. LEXIS 5002,
 *24-25 (S.D. Tex. 2007).

1 court denied the security guard plaintiffs' motion for conditional certification based on various off-
 2 the-clock pre- and post-shift tasks. The evidence, however, confirmed that the alleged off-the-clock
 3 work was "not required on every shift or at every [work] location." *Id.* at 11. Accordingly, any
 4 "unpaid pre- and post-shift work would depend on the [work] locations to which each individual
 5 guard had been assigned...Determining whether the putative class members were required or
 6 suffered to perform such tasks before and after their shifts would require the court to examine the
 7 working conditions, job requirements, and customary practices at hundreds of [work] sites." *Id.* at
 8 11-12. The same holds true here. The nature of Plaintiffs' claims would necessarily require the
 9 Court to not only examine the Bag and Technology Check procedures at each of Apple's 254 retail
 10 stores, but also the circumstances surrounding each alleged check for each Hourly Employee on any
 11 given day.

12 **5. Damage Calculations Are Too Individualized For Collective Action**

13 The U.S. Supreme Court has confirmed that certification is improper when putative class
 14 member damages must be calculated individually.³⁹ The numerous fact questions involved in
 15 determining whether any Hourly Employee is entitled to overtime wages in this case precludes
 16 certification. For each Hourly Employee, a fact finder would need to determine: (1) whether the
 17 Hourly Employee went through Bag or Technology Checks on any day s/he worked; (2) how many
 18 Bag or Technology Checks the Hourly Employee went through each workday (when leaving for
 19 both breaks and the end of the day, only when leaving at the end of the day, etc.); (3) how long each
 20 of those Bag and Technology Checks took (inspection and waiting); (4) the total time spent in Bag
 21 and Technology Checks each workweek; and (5) whether the time spent in Bag and Technology
 22 Checks, if any, put the Hourly Employee into overtime for the workweek. Pursuant to *Comcast*,
 23 Courts deny conditional certification when damage calculations are this complex.

24
 25
 26
 27 ³⁹ *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426, 1433 (2013) (certification improper
 28 because plaintiffs fell "far short of establishing that damages are capable of measurement on a
 classwide basis" and, as a result, "[q]uestions of individual damage calculations will inevitably
 overwhelm questions common to the class.").

F. Any Notice Should Be By First Class Mail And A Third Party Administrator

Plaintiffs ask for an order compelling Apple to provide email notice to Hourly Employees on two separate occasions. (Proposed Order at ¶6). Courts have concluded that notice exclusively by U.S. mail is perfectly adequate,⁴⁰ and have denied requests for e-mail notice because it is unnecessary and disruptive.⁴¹ If notice is ordered, it should go only to Hourly Employees employed within three years of the date notice is mailed because the three-year statute for FLSA claims runs from the date an employee opts to participate. 29 U.S.C. § 256(b).

Plaintiffs' request for Hourly Employees' telephone numbers should be denied because Plaintiffs have not demonstrated why they are entitled to or need that information at this stage of the proceedings.⁴² Plaintiffs' request for permission to maintain a website containing a link to the notice and counsel's contact information is moot. For months, their counsel has maintained a website with links to press releases, the Complaint, and how to "Join This Action." (Strauss Decl., ¶13, Ex. L)

G. The Request For Appointment Of Lead And Liaison Counsel Is Premature

Plaintiffs spend almost as much of their motion on the appointment of interim lead counsel as they do arguing why conditional certification should be granted. Although Apple does not oppose the appointment of lead counsel, it seems premature for Plaintiffs to seek appointment of lead counsel now, before the Court has decided whether to consolidate *Kalin* with this case. (Dkt. No. 72). The appointment of lead counsel could more efficiently be addressed after the consolidation, if there is one, and after the *Kalin* plaintiffs have an opportunity to be heard.

Plaintiffs' request for appointment of "liaison" counsel should be denied. Plaintiffs do not explain what role "liaison" counsel would have, and it would appear to defeat the purpose of

⁴⁰ See *Hart v. U.S. Bank NA*, 2013 U.S. Dist. LEXIS 160147, *19 (D. Ariz. Nov. 8, 2013)(denying request for anything other than U.S. mail, noting "[h]ere, the best practicable notice is first class mail. The Court sees no reason why such notice is inadequate.")

⁴¹ See *Hart*, 2013 U.S. Dist. LEXIS 160147 at *19 ("Furthermore, the Court agrees with Defendant that it would be disruptive to send notice to potential opt-in plaintiffs via their Defendant-provided work email address ..."); *Blakes v. Ill. Bell Tel. Co.*, 2011 U.S. Dist. LEXIS 63225, at *19-20 (N.D. Ill. June 15, 2011) (denying request for e-mail notice as unnecessary).

⁴² See *Daniels v. Aeropostale West, Inc.*, 2013 U.S. Dist. LEXIS 59514 (N.D. Cal. 2013) (denying plaintiff's request for e-mail addresses and telephone numbers since both "are unnecessary for first-class mail delivery."); *Harvey v. AB Electrolux*, 2012 U.S. Dist. LEXIS 31507, at *13-14 (N.D. Iowa Mar. 9, 2012) (denying request for telephone numbers); *Martinez v. Cargill Meat Solutions*, 265 F.R.D. 490, 501 (D. Neb. 2009)(same).

1 appointing lead counsel if the Court also appoints a “liaison” counsel. Apple would still be in a
2 position of not knowing which counsel is authorized to bind the class.

3 **IV. CONCLUSION**

4 Plaintiffs ask this Court to evaluate their motion under the first stage standard, which they
5 frame as lenient. Plaintiffs’ weak evidentiary showing here does not satisfy even the first stage
6 standard, let alone the second stage standard for conditional certification that should apply because
7 Plaintiffs have admittedly already completed “substantial” and “significant” discovery. Plaintiffs do
8 not allege that Apple’s Bag and Technology check policy is unlawful, and indeed, it is not.
9 Plaintiffs’ theory hinges on the alleged uniform unlawful implementation of that policy. However,
10 the testimony of Plaintiffs and their witnesses, extensive video evidence of actual Bag and
11 Technology Checks and even analysis of empirical time-punch data all confirm that there is no
12 common experience of the putative class, and therefore Plaintiffs’ off-the-clock claim for FLSA
13 overtime wages cannot be litigated on a representative basis. Because resolution of Plaintiffs’ FLSA
14 overtime claim depends on countless individualized questions of fact, which in light of due process
15 considerations can only be fairly resolved on an individual basis, Plaintiffs’ motion for conditional
16 certification should be denied.

17
18 Dated: December 23, 2013

19 /s/ Julie A. Dunne
20 JULIE A. DUNNE
21 LITTLER MENDELSON, P.C.
22 Attorneys for Defendant
23 APPLE INC.
24
25
26
27
28